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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

VILLAGE OF HOFFMAN ESTATES, ILLINOIS, *et al.*,
Appellants,

vs.

THE FLIPSIDE, HOFFMAN ESTATES, INC.,
an Illinois Corporation,
Appellee.

On Appeal From The United States Court
Of Appeals For The Seventh Circuit

BRIEF AMICUS CURIAE OF AMERICAN BUSINESSES FOR CONSTITUTIONAL RIGHTS

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INTRODUCTORY STATEMENT

This brief is filed pursuant to Rule 36(2) of the Rules of the Supreme Court of the United States by Amicus American Businesses for Constitutional Rights, an unincorporated trade association consisting of approximately 75 retailers, manufacturers and distributors of various decorative and novelty items and smoking accessories, some of which may be items intended to be regulated by the various drug paraphernalia statutes which have recently arisen. The various members of Amicus also sell, distribute and display books, magazines and other constitu-

tionally protected literature. Amicus' business activities may be affected by the Court's decision in this matter. American Businesses for Constitutional Rights is appearing as amicus curiae in support of the position taken by The Flipside, Hoffman Estates, Inc., the Appellee in this cause.

Verbal consent to the filing of this brief Amicus Curiae has been obtained from counsel for both parties and, written consent, if not already lodged with the Clerk of the Supreme Court of the United States, is in the process of being so filed.

INTEREST OF AMICUS CURIAE

As noted in the introductory statement, Amicus is an unincorporated trade association made up of approximately 75 manufacturers, retailers, and distributors of smoking accessories, decorative and novelty items, books and magazines. Amicus is greatly concerned by recent legislation such as the ordinance of Hoffman Estates at issue in the instant case, which attempts to penalize, or in other manners affect, the free exercise of First Amendment rights of merchants to stock, sell, display or publicize constitutionally protected literature. Further, Amicus believes that legislation, such as the ordinance at issue, which requires a merchant to keep a log book, open to the police, in which the merchant must record the name and address of the purchaser, along with the description and quantity of the item purchased is an unwarranted intrusion into the business lives of merchants who deal in articles that are not inherently dangerous to human nature. Because of the multi-use nature of most items sought to be regulated under the Hoffman Estates Ordinance, Amicus seeks to have the Court uphold the decision of the Seventh Circuit Court of Appeals below.

Due to the vague manner in which the ordinance attempts to define the conduct which it regulates, Amicus is concerned that merchants will be unable to discern which activities may require the issuance of a license. Inability to distinguish between

regulated and unregulated conduct invites arbitrary and discriminatory enforcement based on the personal values, aesthetic tastes and prejudices of those charged with enforcement of the ordinance. Absent viable enforcement standards, the ordinance impermissably delegates basic policy matters to law enforcement officials and invites application in an ad hoc and subjective manner.

SUMMARY OF ARGUMENT

Amicus posits that Ordinance No. 969-1978 of the Village of Hoffman Estates, Illinois is so vague as to violate the due process clause of the Fourteenth Amendment. That is not its sole constitutional defect. It also impermissibly impinges upon fundamental freedoms guaranteed by the First Amendment of the Constitution of the United States. This infringement occurs through the ordinance's use of the proximity of literature which encourages the illegal use of drugs or cannabis as one of the factors which triggers application of the ordinance. Where vague legislation touches upon fundamental First Amendment rights, it must withstand stricter scrutiny of its vagueness than statutes which do not so affect First Amendment rights. The use of the proximity of constitutionally protected literature to trigger the application of the ordinance will necessarily result in a chilling affect on merchants' exercise of their First Amendment freedoms. If literature, which is in and of itself constitutionally protected, may be deemed by some to encourage the illegal use of drugs, thereby requiring the seller of such literature to obtain a license in order to sell other items in the store, content-based censorship motivated by self-preservation will result. Failure to so censor one's salable literature may result in prosecution for selling items deemed covered under the ordinance due to their proximity to constitutionally protected literature.

Further, where legislation involves fundamental freedoms, such as those guaranteed by the First Amendment, the legislation must withstand stricter constitutional scrutiny under the

standards embodied in the First and Fourteenth Amendments to the Constitution of the United States. Where legislation affects First Amendment freedoms, the legislation must be the least restrictive alternative available to the government to achieve the desired goal. It is insufficient for the legislation merely to be rationally related to a legitimate state purpose. Indeed, legislation affecting fundamental freedoms must be necessary to accomplish a compelling state purpose. The Hoffman Estates Ordinance fails to satisfy either requirement. It seeks to accomplish what cannot be termed a compelling state purpose. Further, it is not necessary to link the ordinance to First Amendment rights to accomplish even the purported governmental goal sought to be achieved by the Hoffman Estates Ordinance.

The municipal ordinance at bar contains no scienter element. No language in the ordinance purports to incorporate a "willfull", "knowing" or "intentional" *mens rea* standard. Rather, application of the ordinance is dependent upon the physical characteristics of certain items such as "roach clips" or cigarette papers. The ordinance is also triggered by displaying other items in proximity to: (1) items covered due to their physical characteristics; or (2) constitutionally protected literature declared to "encourage" the illegal use of drugs. Scienter cannot merely be declared to be a proper element of this ordinance.

Regardless of whether a scienter standard is read into the ordinance at issue, it fails to satisfy the standards of permissible vagueness detailed in *Grayned* v. *City of Rockford,* 408 U.S. 102, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). The ordinance of Hoffman Estates does not, on its face, require that a merchant have any specific intent to violate the ordinance before a prosecution for failing to obtain a license for selling items regulated thereunder may be instituted. Even if, however, a scienter standard is imposed on the ordinance, it does not cure the vagueness inherent in this legislation. Where the specific act(s) which is prohibited by the legislation is uncertain, imposition of a scienter

element into the law may cure such vagueness only where the legislation gives, to the ordinary citizen, notice of the circumstances in which the requisite evil intent will be inferred. In the absence of knowable circumstances from which evil intent may be inferred, addition of a scienter element into a prosecution does nothing to more clearly define the act(s) which is prohibited by the law.

The ordinance of Hoffman Estates, and its accompanying guidelines, do not provide notice to merchants of the circumstances from which their intent to sell items designed or marketed for use with illegal cannabis or drugs may be inferred. The license guidelines provided by the Village are in and of themselves so vague as to be useless in foreseeing the circumstances in which one may be deemed to have had the necessary intent. The Model Drug Paraphernalia Act proposed by the Drug Enforcement Agency is radically different from the ordinance at bar. It appears to attempt, however, to include more specific factors which are to be considered in determining the status of an object and accordingly sets out fourteen specific factors which are to be considered by a court in determining whether an item is drug paraphernalia. These factors, assuming an element of scienter in the Model Act, also fail to provide any reasonable warning of the circumstances in which one will be inferred to have had intent to sell drug paraphernalia. The Model Act defines no more clearly than does the ordinance of Hoffman Estates the act(s) which is to be covered or prohibited.

Finally, regardless of the element of scienter, the chilling effect of such an ordinance on the exercise of First Amendment rights by merchants is still present. When a merchant is confronted with a borderline situation, the honest resolution of a doubt in his own favor may be deemed to connote the requisite evil intent. Where this is a possibility, the effect of such legislation will be to force merchants to act as censors of the publications which they sell and steer far wider of the lawful zone than if the boundaries of the forbidden area had been clearly marked.

ARGUMENT

I. The Municipal Ordinance Of Hoffman Estates Is Unconstitutionally Vague Due To Its Chilling Effect On The Exercise Of Rights Guaranteed By The First Amendment Of The Constitution Of The United States.

Unquestionably, the ordinance at issue constitutes state action for purposes of analysis under the Fourteenth Amendment of the Constitution of the United States. *Carlson* v. *People of State of California,* 310 U.S. 106, 60 S.Ct. 746, 84 L.Ed. 1108 (1940). Further, as the Appellant's brief admits, the fact that the ordinance purports to be regulatory rather than penal does not absolve it from adherence to the constitutional principles which are offended by vague laws. As the Court of Appeals below found, the fundamental defect in vague legislation is not the existence of a penalty; rather, it is "the exaction of obedience to a rule of standard . . . so vague as to be no rule or standard at all." *A. B. Small Company* v. *American Sugar Refining Company,* 267 U.S. 233 at 239, 45 S.Ct. 295, 69 L.Ed. 589 (1925).

The Constitutional principles which are offended by vague laws are at least three in number. In what has become the definitive language in this field, the Court in *Grayned* v. *City of Rockford,* 408 U.S. 102 at 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972) declared:

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant

> dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abuts upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of those freedoms." Uncertain meanings inevitably lead citizens to "steer far wider of the unlawful zone . . . than if the boundaries of the forbidden area were clearly marked." (Citations omitted.)

It is the third constitutional value offended by vague laws, the inhibiting effect on the exercise of citizens' First Amendment rights, that is the primary thrust of this analysis. It is submitted that ill-defined legislation which touches upon First Amendment rights creates two separate constitutional problems under the Fourteenth Amendment alone. First, such legislation 'aggravates the vice of vagueness' by attaching possible duties, obligations, or penalties to otherwise protected expressions of speech. *Cramp* v. *Board of Public Instruction,* 368 U.S. 278, 82 S.Ct. 275, 7 L.Ed.2d 285 (1961). Secondly, by impacting upon rights protected under the First Amendment, stricter standards of analysis must be applied to the legislation, not only in determining the extent of permissible vagueness but also in examining the connection between the end sought to be achieved and the means chosen to accomplish that purpose. When legislation affects First Amendment rights, it is only the least restrictive alternative that is acceptable. *Shelton* v. *Tucker,* 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960).

Hoffman Estates' ordinance No. 969-1978, in short, makes it unlawful for any person to sell any item which is designed or marketed for use with illegal cannabis or drugs without being licensed to do so. Additionally, once licensed the merchant must keep a police log in which must be kept the name and address of purchasers of items sought to be regulated, along with the name and quantity of the item purchased and the date and time of such purchase. This record must be signed by the agent of the merchant making the sale and must be kept, open to the police, for a period of two years after the date of the sale.

While the ordinance purports to require registration of only specific items which are designed or marketed for use with illegal drugs the only safe course, for any merchant, is to register all purchases from the store. Indeed, as noted in Footnote 1 of the opinion of the Circuit Court below (639 F.2d at 375), the Appellee was advised by counsel for the Appellant that all items sold should be noted on the police register. Given the standard definition of the word 'paraphernalia' — articles of equipment — no other course of action is possible. This definition, parenthetically, is the one adopted by the District Court below in its construction of this ordinance.

In an attempt to ameliorate the obvious constitutional deficiencies in the ordinance, the village passed certain license guidelines intended to be read in conjunction with the ordinance. The guidelines are set out in the footnote below.[1] The license guidelines promulgated by the Appellant make clear that an important factor in determining whether a merchant's marketing scheme is such that it triggers application of the ordinance is the proximity of an item, such as a pipe, to literature which encourages the illegal use of cannabis or drugs.

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[1] LICENSE GUIDELINES FOR ITEMS, EFFECT, PARAPHERNALIA ACCESSORY, OR THING WHICH IS DESIGNED OR MARKETED FOR USE WITH ILLEGAL CANNABIS OR DRUGS

Paper—white paper or tobacco oriented paper not necessarily designed for use with illegal cannabis or drugs may be displayed. Other paper of colorful design, names oriented for use with illegal cannabis or drugs and displayed are covered.

Roach Clips—designed for use with illegal cannabis or drugs and therefore covered.

Pipes—if displayed away from the proximity of nonwhite paper or tobacco oriented paper, and not displayed within proximity of roach clips, or literature encouraging illegal use of cannabis or illegal drugs are not covered; otherwise, covered.

Paraphernalia—if displayed with roach clips or literature encouraging illegal use of cannabis or illegal drugs it is covered.

The ordinance is not one which regulates an article about which there is no uncertainty of definition, such as milk or flowers. Rather, it regulates, "drug paraphernalia" an item which is not really an item at all. It is actually a concept, and an amorphous one at best. For, as so many of the courts which have considered drug paraphernalia legislation have noted, what constitutes drug paraphernalia is limited only by the ingenuity of the drug user. Because of the unlimited number and nature of the items which can be drug-related paraphernalia the external standards which may trigger application of the ordinance become ever more important. Indeed, Appellee was forced to remove 72 items from its shelves in an attempt to eliminate the possibility of prosecution under the ordinance. While the District Court viewed this action as indicating that the definition of drug paraphernalia was clear, the contrary is true. By removing all items of questionable status, it is not clear how many items which would not have been regulated under the ordinance, if enforced, may have been removed. Even this action, however, does not eliminate the possibility that Appellee has not fully complied with this ordinance. The extremely broad scope of the ordinance, through its link to constitutionally protected literature, would require the Appellee or any other merchant to obtain a license if literature which encourages the use of illegal drugs is sold in a store which sells any other objects. Without clear and precise standards concerning the covered items, to use a phrase from *Grayned,* one is forced to "steer far wider of the unlawful zone than if the boundaries of the forbidden area were clearly marked."

The vagueness inherent in an ordinance which regulates a concept, rather than an article, is compounded by the fact that one of the triggering factors of this ordinance is the proximity of an item to constitutionally protected literature which "encourages" the use of illegal drugs. The nebulous nature of this triggering standard, through its use of language such as "proximity" and "encourages", is apparent. Does the literature need to advocate the use of drugs by all, or is it sufficient that it discusses the ef-

fects of drugs on the mind or body? Given the psychology of youth, literature which condemns drug use as harmful or immoral may be as enticing to those viewing it as would be literature which glorifies drug use. Certainly, literature which seeks to have the laws governing the use of certain drugs changed, such as pamphlets or ads put out by the National Organization for Reform of Marijuana Laws (NORML) could be thought by some to encourage the use of drugs. If the existence of such literature in proximity (however that may be defined) to a salable item triggers the application of the ordinance, then any sale in the proximity of almost any literature may result in prosecution for failing to obtain the license necessary to sell the item. Again, as the Circuit Court noted below:

> It appears that displaying almost any item in the proximity of "literature encouraging illegal use of . . . drugs" requires the store to obtain a license and have purchasers sign the register. This means that paper clips sold next to *Rolling Stone* magazine conceivably could trigger the requirements of the ordinance. Perhaps the village would not construe the ordinance in this manner. But the point is that there is no way for a seller to determine which particular item or arrangement of merchandise will require a license. 639 F.2d at 382

As the Court declared in *Baggett* v. *Bullitt*, 377 U.S. 360 at 373, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964): "Well-intentioned prosecutors and judicial safeguards do not neutralize the vice of vagueness."

With ambiguity such as this abounding throughout this ordinance, a merchant is effectively required to choose between the exercise of his First Amendment right to sell or display constitutionally protected literature; his right to espouse beliefs which are different from the majority's; or his right to seek the change of laws with which he disagrees and the possible destruction of his business. For as again noted by the Court of Appeals

below, this ordinance, while formally recognizing the right of merchants to sell the items sought to be regulated, is actually an attempt to do covertly what is forbidden to it overtly. Indeed, the parties stipulated below that the primary purpose of requiring a police register is to discourage the purchase of the items sought to be regulated. 639 F.2d at 385, Footnote 29.

When the vagueness inherent in an ordinance which attempts to regulate a concept, rather than a specific article, is combined with the vague standards which trigger the ordinance, (literature which *encourages* the use of illegal drugs when displayed in *proximity* to pipes or paraphernalia — articles of equipment) it is apparent that there is vagueness upon vagueness. When that vagueness abuts fundamental First Amendment rights, as here, the third constitutional value endangered by vague laws is in true peril. A merchant should not be forced to act as a censor of literature merely because he sells merchandise other than literature. When faced with choosing between property and liberty, both of which are protected by the due process clause of the Fourteenth Amendment, there is no choice that is acceptable. This problem is intensified when the ordinance does not make clear what choice the ordinance considers a merchant to have made by a given act. The Hoffman Estates ordinance does indeed exact obedience to a standard which is no standard. There is simply no way to tell when one may be endangering his business or facing prosecution under this ordinance by selling or possessing constitutionally protected literature.

Beyond the ordinance's "aggravation of the vice of vagueness" its link between First Amendment rights and the ordinance's coverage exposes another constitutional infirmity under the due process clause of the Fourteenth Amendment. As noted earlier, where legislation infringes on fundamental First Amendment rights, it must be more carefully scrutinized by the courts. That it is rationally related to a legitimate governmental purpose is no longer sufficient to justify the law. It must be the least restrictive alternative available to the government.

"Stricter standards of permissible vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser." *Smith* v. *California,* 361 U.S. 147 at 151, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959), *Cramp* v. *Board of Public Instruction,* 368 U.S. 278 at 287, 82 S.Ct. 275, 7 L.Ed.2d 285 (1961).

Nor does the attempt to impose a scienter standard on the ordinance alleviate the problem. *Cramp* v. *Board of Public Instruction, Id.* It is meaningless to hold that the law must be violated knowingly when the law is so vague as to be unknowable and dangerous to so hold when fundamental freedoms are affected.

Even assuming, then, a legitimate governmental purpose behind this ordinance, (although this assumption is rebutted by the stipulation of the parties noted above — attempting to discourage the purchase of legitimate items of which those in power do not approve can hardly be termed a legitimate state purpose) regulation in a manner which has as one of its unavoidable consequences a chilling effect on the exercise of First Amendment rights is impermissible. For, as the court noted in *Shelton* v. *Tucker,* 364 U.S. 479 at 488, 81 S.Ct. 247 at 252, 5 L.Ed.2d 231 (1960), "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."

Requiring merchants who sell or display literature which discusses or relates to drug use to do so only while either branding themselves as merchants who deal in items for use with illegal drugs or facing possible prosecution for not so branding themselves can hardly be termed the least restrictive alternative available to the government. The decision to sell or display constitutionally protected literature which concerns or discusses drugs, or to exercise one's right to seek the change of laws which

one feels — for whatever purpose — should be changed, is not a decision that is to be made under the cloud of prosecution or the possible destruction of one's business. Fear of such destruction is well founded. Mere inconvenience to customers, if not the fear of heightened police scrutiny, would be sufficient to achieve the purpose of the Village of Hoffman Estates, as that purpose is noted in the stipulation of the parties cited above.

"The power to regulate must be so exercised as not, in attaining a permissible end, unduly to abridge the protected freedom". *Cantwell* v. *Connecticut,* 310 U.S. 296 at 304, 60 S.Ct. 900 at 903, 84 L.Ed. 1213 (1940).

As recognized by the Supreme Court of California in *People* v. *Fogelson,* 145 Cal.Rptr. 542, 577 P.2d 677 (1978) the fact that the ordinance does not on its face purport to regulate First Amendment activities does not absolve it of its constitutional obligations for affecting those rights. That the Hoffman Estates ordinance does not purport to regulate literature itself does not change its chilling impact on those who deal in, or publicize because of their own beliefs, such literature.

The net effect of the linkage between the ordinance with its concomitant penalties for violation and the First Amendment rights of merchants to display constitutionally protected literature is similar to the loyalty oaths at issue in the case of *Baggett* v. *Bullitt,* 377 U.S. 360, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964). In discussing the oaths at issue, the Court in *Baggett* stated that "the uncertain meanings of the oaths require the oath-taker — teachers and public servants — to 'steer far wider of the unlawful zone' than if the boundaries of the forbidden zone were clearly marked." (Citations omitted), 377 U.S. at 372.

Similarly, tying the necessity of a license and the keeping of a police register to the exercise of one's fundamental First Amendment rights results in the same problem. Merchants will steer far wider of the boundaries within which constitutionally protected literature would trigger the application of the ordinance than if its coverage were clearly defined.

It is this chilling effect that mandates, when dealing with legislation affecting First Amendment rights, that only the least restrictive alternative be used. In the instant case, there is no need at all for a regulation to be tied to the publications which one possesses, either for sale, display or personal statement. To exact so heavy a price for the exercise of First Amendment freedoms is prohibited by the due process clause of the Fourteenth Amendment.

Further, it is likely that the ordinance's link between licensing, with its accompanying penalities, and the fundamental rights of free speech and press renders the ordinance invalid under the First Amendment itself.

The ordinance impermissibly regulates, although indirectly, the content of literature sold in the village. Government action aimed at suppressing the content of a communication is presumptively violative of the First Amendment. *Police Dept. of City of Chicago* v. *Mosely,* 408 U.S. 92, 95 S.Ct. 2286, 33 L.Ed.2d 212 (1972). The ordinance imposes a substantial burden on protected First Amendment freedoms. By requiring a license in order to sell literature along with other merchandise, the ordinance is effectively a prior restraint on the dissemination of the ideas embodied in literature. Further, the ordinance unquestionably penalizes protected symbolic speech. *Tinker* v. *Des Moines Community School District,* 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). The ordinance also impermissibly penalizes protected commercial speech as the method of display and marketing chosen by a merchant is a commercial message to potential customers just as is a television commercial or newspaper advertisement. Thus, should the Court find this ordinance valid under the Fourteenth Amendment, it is submitted that the case should be returned to the Circuit Court for examination of the other constitutional infirmities alleged by the Appellee at trial.

II. Imposition Of A Scienter Requirement On The Ordinance Does Not Cure Its Vagueness.

Appellant argues in its brief, at page 21, that scienter is a necessary element in the Hoffman Estates Ordinance. Consequently, Hoffman Estates maintains that Ordinance No. 969-1978 is not impermissibly vague, as the village would have the burden of proving, in any action based upon violation of the ordinance, that the merchant sold items intending them to be designed or marketed for use with illegal drugs without obtaining a license therefor. Examination of the total ordinance, in connection with the license guidelines, belies such a position.

The license guidelines make clear that the coverage of the ordinance is dependent upon external factors beyond control of a merchant. Items "designed" for use with illegal drugs are discovered, under the license guidelines, by examining their physical characteristics. Cigarette papers, for example, are covered unless they are white papers or tobacco-oriented papers not necessarily designed for use with illegal cannabis.

The Court below saw the vagueness inherent in this definition, however, for purposes of this argument it is sufficient to note that coverage is based not on the intent or design of the merchant but rather upon the physical characteristics of the papers themselves.

Coverage based on whether an item is marketed for use with illegal drugs appears to connote more of an individualized intent requirement. Close analysis of the license guidelines indicates, though, that whether an item, for example a pipe, is covered is based upon whether it is displayed within proximity of items whose status under the ordinance is based solely on design, such as non-white cigarette papers or "roach clips". The ordinance may also be triggered by displaying a pipe within proximity to literature deemed to encourage the use of illegal drugs. Thus, in the absence of other items covered solely on their physical

characteristics an item such as a pipe would not be covered. With the ambiguous definition given items deemed to be drug paraphernalia *per se*, such as roach clips, the use of the marketing scheme as a trigger for the ordinance is circular. As the testimony cited in Footnotes 17 and 18 of the opinion below indicate (639 F.2d at 381), there are no design characteristics of a "roach clip" which are different from those of an alligator clip. Hoffman Estates would determine, then, whether a certain clip is covered based on the merchant's marketing concept. But a determination of whether a given marketing concept is one which orients the products towards use with illegal drugs is based upon whether an item is displayed next to items considered drug related *per se* because of design characteristics. When a merchant is finished chasing his tail in an attempt to determine if his marketing scheme requires a license, the final arbiter is either (1) the nearness of objects covered based on their design characteristics; or (2) the proximity of constitutionally protected literature. It is therefore submitted that no scienter standard can properly be read into the ordinance at issue. The specific intent of a merchant is irrelevant in determining whether this ordinance requires the merchant to obtain a license or face penalties for failing to do so.

Even assuming, however, that a scienter element is found in this ordinance, scienter does not save the ordinance. For, as Justices Roberts, Frankfurter, and Jackson, in their dissent from the plurality opinion in *Screws* v. *U.S.*, 325 U.S. 91, at 153, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945) eloquently stated:

> When a criminal statute prohibits something from being 'willfully' done, 'willfully' never defines the physical conduct or the result the bringing of which to pass is proscribed. 'Willfully' merely adds a certain state of mind as a prerequisite to criminal responsibility for the otherwise proscribed act. If a statute does not satisfy the due-process requirement of giving decent advance notice of what it is which, if happening, will be visited with punishment, so that men

> may presumably have an opportunity to avoid the happening . . ., then 'willfully' bringing to pass such an undefined and too uncertain event cannot make it sufficiently definite and ascertainable. 'Willfully' doing something that is forbidden, when that something is not sufficiently defined according to the general conceptions of requisite certainty in our criminal law, is not rendered sufficiently definite by that unknowable having been done 'willfully'.

In detailing the logical steps taken to arrive at this conclusion, reference may be made to cases arising out of legislation based on the Model Drug Paraphernalia Act supported by Amici Arkansas, *et. al.* By and large, however, the issues raised and concerns voiced in the brief Amicus Curiae of Arkansas, *et. al.*, are irrelevant to a determination of the issues raised in the instant case.

In the drug paraphernalia context, the phrase "designed for use" does create an impermissible vagary. For, as Judge Conaboy found in the *Lazy J. Ltd.* v. *Borough of State College*, No. 80-1167, slip. op. at pp. 4-6 (M.D. Pa. January 30, 1981), the phrase creates two classes of vagueness. The first is an interpretational vagueness — does the act allow for prosecution based on transferred intent? The second is a definitional vagueness — what acts are prohibited, or items are covered, under that phrase?

Imposition of a scienter standard may cure the first vagueness. It can be held to eliminate the possibility of prosecution based on the intent of someone other than the person charged with the violation. The Court in *Lazy J. Ltd.* found, however, that a clear reading of "designed for use" failed to do even that. More importantly for immediate purposes, however, the court found that scienter had no impact upon definitional vagueness — in the instant case, what items are covered. Quoting from the opinion of the three judge panel in *Indiana Ch., NORML* v. *Sendak*, No. Th 75-142-C (S.D. Ind. Feb. 4, 1980), the Court held:

> ...[T]he term 'designed' could sweep into the definition of paraphernalia any device that could be altered from its normal function to become a makeshift drug device, such as a paper clip, tie bar, hand mirror, spoon, or piece of aluminum foil. The definition 'designed for drug use' gives no hint to those attempting to comply with [the ordinance] what is included in the definition. The definition fails to make clear what items are included in the statutory prohibition and what items are not.' *Id.*, slip op. at 13. (Also adopted in *Record Revolution No. 6* v. *City of Parma*, 638 F.2d 916 (6th Cir. 1980) vacated and remanded, 49 U.S.L.W. 3882, May 26, 1981)

Imposition of a scienter element cannot cure this definitional vagueness in the instant case. Considered under *Grayned*, a law is impermissibly vague if it: (1) fails to place a person of ordinary intelligence on notice as to the prohibited conduct; (2) fails to provide enforcement standards; (3) chills First Amendment rights, if First Amendment rights are involved.

Scienter may cure interpretational vagueness — that is, what standards of enforcement will be applied. The question of whether scienter can cure definitional vagueness — what is prohibited — is more complex. In this context scienter defines the state of mind that will make an ordinary act a prohibited one.

To accomplish this purpose, however, the specific intent standard must do more than add specific intent as an element of the crime. As intent is usually proven by circumstantial evidence, the specific intent requirement combined with the prohibited act must give a person of ordinary intelligence fair warning of the circumstances in which intent will be inferred. Without such circumstances, the addition of a scienter element to an ordinary act (be it making a telephone call or selling a pipe) is meaningless because of the impossibility of classifying the act as one which is prohibited.

Where the act involved is a common legitimate act, the specified intent must provide notice of the circumstances from which the evil intent may be inferred in order to provide notice of the prohibited act. Consider *Music Stop, Inc.* v. *City of Ferndale,* 488 F.Supp. 390 (E.D.Mich. 1980). In *Ferndale,* the city council passed an ordinance making it unlawful to sell or in any way furnish any instrument primarily designed or adapted for use with a controlled substance. Among the specifically defined terms in the ordinance was the definition of a marijuana or hashish pipe, that being a "pipe characterized by a bowl so small that the primary use for which it is reasonably adapted or designed is the smoking of marijuana or hashish." (488 F.Supp. at 391)

The Court found this definition, among other, impermissibly vague as there are no ascertainable standards which would allow a merchant to infer that a particular pipe has a bowl "so small" as to be primarily designed or adapted for use with marijuana or hashish. The Court considered and rejected the claim that the standards of *McGowan* v. *Maryland,* 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1960), allowed the city to place the burden of defining the prohibited acts on the merchant. Accord, *Magnani* v. *City of Ames, Iowa,* 493 F.Supp. 1003 (S.D.Iowa 1980).

Screws v. *U.S.,* 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495, does not hold otherwise. *Screws* involved construction of § 20 of the U.S. Criminal Code (18 U.S.C. § 52), which made criminal the willful deprivation of a constitutional right. (325 U.S. at 103) In determining whether the statute was unconstitutionally vague due to the shifting nature of constitutional rights as defined by the courts, Justice Douglas, writing for the plurality, stated that it is only where the constitutional right has been specifically defined, either by the courts or the Constitution, that a violation could be found.

The plurality held only that where an intent to deprive a person of a specific (defined) constitutional right is present, an ac-

cused may not sufficiently protest that he had no prior notice that he was committing a criminal act. In fact, at 325 U.S. 105, the plurality opinion states:

> Of course, willful conduct cannot make definite that which is undefined. But willful violators of constitutional requirements, which have been defined, certainly are in no position to say that they had no adequate advance notice that they would be visited with punishment.

Thus, for scienter to cure definitional vagueness, the specific intent requirement and the act or conduct defined in the statute must together provide notice to ordinary citizens of the *prohibited* conduct. When the defined conduct — the *actus reus* — is generally legitimate, as for example the sale of a pipe, the *mens rea* required must clearly indicate the circumstances from which the intent which makes the act prohibited will be inferred. Otherwise, the citizen remains unable to tell whether his act is legal or illegal.

In focusing on the ordinance's failure to warn citizens of the conduct regulated, it would be easy to neglect the problems which this uncertain definition creates under the second prong of *Grayned*. The vague definition of the regulated act, even assuming the presence of the element of scienter which, as noted earlier, is not present in this ordinance, leaves policemen, prosecutors, judges and juries free to speculate on the standards by which one charged with a violation of the ordinance is to be judged.

In discussing the problem of the lack of enforcement standards, the three judge panel in *Indiana Ch., NORML* v. *Sendak*, No. Th-75-142-C, slip. op. at 16 (S.D.Ind. Feb. 4, 1980) stated:

> The main and often only circumstances will be possession of a device deemed on an ad hoc basis to be paraphernalia. Given the inability of the statute to specify what is or is not paraphernalia and given the bootstrapping nature of the in-

> tent requirement, there is a clear danger that people who did not intend to violate I.C. 35-48-4-8 and did not think they were in violation of the law will nevertheless be deemed to be in possession of paraphernalia.

While the above quotation concerns a drug paraphernalia act radically different from the one at bar, the lack of enforcement standards is an apparent similarity. When the items to be covered are inherently multi-use items, failure to set out standards for enforcement clearly delegates basic policy matters to law enforcement officials.

The Village of Hoffman Estates has recognized the necessity of standards to guide those charged with enforcing the ordinance. It has attempted to alleviate this problem by passage of the license guidelines previously referred to. As will be seen, however, the guidelines do not cure the problems of the ordinance.

As noted initially, the Hoffman Estates ordinance does not appear to have any scienter requirement. If, however, scienter is read into the ordinance, it still fails to provide notice of the regulated conduct.

Section 1(A) of the ordinance effectively prohibits the sale of anything by anyone without a proper license (the *actus reus*) where the object sold is designed or marketed (intended) for use with illegal drugs (the *mens rea*).

The act prohibited — the sale of anything — provides no reasonable notice of what specific conduct is prohibited. Thus, to satisfy *Grayned*, the intent standard must provide in its entirety the notice of the prohibited conduct. As earlier indicated, this can be done only where the specific intent standard provides notice of the circumstances from which it can reasonably be foreseen that the intent requisite to create the forbidden act will be inferred.

The license guidelines attempt to specify when the ordinance will apply and thus provide the only standards in the ordinance from which a merchant may foresee the circumstances in which the requisite intent will be inferred. These guidelines are themselves, however, so vague as to provide no notice at all.

The first guideline involves the sale of cigarette papers. They are covered under the ordinance unless they are white papers or tobacco-oriented papers not necessarily designed for use with illegal drugs. Obviously, all cigarette papers may contain any material which may be smoked. How is a merchant to tell what are tobacco-oriented cigarette papers? Are brown or beige papers acceptable or must they have "Bull Durham" stamped on the package? Further, if design does not refer to objective physical characteristics then white or tobacco-oriented papers may be "designed" for use with illegal drugs just as colorful cigarette papers may. When is a cigarette paper not *necessarily* designed for use with illegal drugs? The only thing that this guideline tells a merchant is that unless he sells only solid white cigarette papers, with no colorful design on the package, his actions *may* require a license. Certainly, these guidelines give no help in determining what conduct of the merchant's is covered or what circumstances will allow the government to infer the requisite bad intent, and thereby trigger the application of the ordinance.

Secondly, "roach clips" are items deemed designed for use with drugs and therefore covered. What, however, is a "roach clip"? Testimony noted in Footnotes 17 and 18 of the Circuit Court opinion below (639 F.2d at 381) shows that there are no design differences between an alligator clip and a "roach clip". Hoffman Estates would, therefore, decide whether a given clip is covered based on a merchant's marketing scheme. If, however, the merchant's intent as evidenced circumstantially by his marketing scheme is to provide him notice of the prohibited conduct, the ordinance must specify what marketing scheme will allow that inference. The second guideline is of no help in deter-

mining those circumstances, however, as they do not tell him what marketing scheme will imply that he is selling "roach clips". Rather, they tell him only that if he sells clips at all such a sale is evidence of his marketing scheme. The circular reasoning of the ordinance gives no warning, then, as to its scope of coverage under this standard.

Thirdly, pipes are not covered under the ordinance unless they are sold within proximity of: (1) non-white or tobacco-oriented paper (which is itself unregulated by the ordinance); (2) roach clips; or (3) literature which encourages the use of illegal drugs. At first blush, this guideline appears to give the merchant more objective determinants of the circumstances from which his intent will be inferred, therefore defining the covered or prohibited conduct more specifically. Closer analysis, however, shows that it fails to provide any objective criteria of measurement. What is within "proximity"? *Webster's Third New International Dictionary* 1828 (1976) defines "proximity" as the state of being proximate, which in turn is defined as very near or close. *Black's Law Dictionary* 1391 (4th ed. 1968) defines "proximate" as immediate; nearest; direct; or next in order. May a merchant stock pipes and non-white cigarette papers if they are not directly next to one another in the store? Similarly, assuming one knows what a "roach clip" is, as opposed to any other clip, how close may they be to other objects before there is a inference of intent and the ordinance is triggered. Additionally, as noted in Proposition I above, how does one define literature that "encourages" the use of drugs; must it advocate drug use or is it sufficient that it merely states that certain drugs have not been shown to have addictive effects. Is one magazine article sufficient literature to trigger the ordinance or must it be a series of articles or a number of books. A person of ordinary intelligence remains unable to determine what circumstances will imply an intent that the items sold be used with illegal drugs. Due process demands more than a guessing game as to the prohibited conduct.

The final guideline does no better. It provides that a merchant may infer that "paraphernalia" is designed or marketed for use with illegal drugs if it is displayed near roach clips or literature which encourages the illegal use of drugs. The same problems confront this guideline as did the others above and repetition of these problems would serve no purpose. Suffice it to say that they provide no guidance to the merchant as to what conduct of his will imply the necessary intent and thereby trigger the ordinance. As is said in Las Vegas, "Round and round she goes and where she stops nobody knows". Due process requires more than forcing a citizen to "pay his money and take his chances", gambling on whether his conduct is prohibited, especially where there are sanctions for failing to properly guess the answer.

Appellant suggests, that, given more time, it, through its Administrative procedures Act, would have adopted more sufficient guidelines. Appellant speculates that they would have been akin to the criteria listed in the Model Act proposed by the DEA and supported by Amici Arkansas, *et al.*

Amicus avers that full and comprehensive analysis of the entire Model Act will show that it suffers from many of the same constitutional defects that exist in the ordinance at bar. The Model Act is contained in the appendix of the brief Amicus Curiae of Arkansas, et. al. To attempt, however, to discuss the constitutional status of an act not before the Court is to obscure the Court's view of both the Model Act and the Hoffman Estates Ordinance. Suffice it to say that the criteria listed in the Model Act which a court or other authority shall consider in determining whether a particular item is drug paraphernalia have peculiar constitutional problems of their own.

Because of the individual modifications of the Model Act made by the various states and localities which have adopted the Model Act, only a general analysis of the Act as proposed would be possible. Such a general discussion would, however, be largely irrelevant to the specific issues at bar. Accordingly, Amicus will

only point out to the Court that the courts below are split on the constitutionality of the various adaptations of the Act which have been judicially scrutinized. Many of these courts have specifically found the list of criteria contained in the Act which are to be considered in determining the status of an object to be either unconstitutional or so ethereal as to provide no benefit to either law enforcement officials or ordinary citizens. *See, General Stores, Inc.* v. *City of Albuquerque,* No. 81-0027-M, slip. op. at p. 6 (D.N.M. March 24, 1981); *Lazy J. Ltd.* v. *The Borough of State College,* No. 80-1167, slip. op. at p. 8-9 (M.D.Pa. Jan. 30, 1981); *The Town Tobacconist, et al.* v. *Degnan* (Superior Court., N.J., March 12, 1981); *Weiler* v. *Carpenter,* No. 80-637-JB. slip. op. at p. 23 (D.N.M. Feb. 11, 1981)

Indeed, as the Court in *Lazy J. Ltd., supra,* stated:

> The difficulty with these standards is that they do not take discretion away from police, magistrates and judges who are to administer the act. In fact, they simply add to the subjective nature of the decision to enforce the statute. They give full leeway to the enforcing officer to determine what statements indicate an intent to use an object with drugs, what manner of advertising and what manner of displaying connote the requisite intent.

While cases holding to the contrary exist, it is sufficient to note that adoption of the Model Act criteria would not inherently have remedied the defects in the ordinance at issue. Further discussion of the factors involved in legislation based on the Model Act must, however, await the proper forum.

Finally, it must not be forgotten that the Hoffman Estates ordinance is linked to the exercise of fundamental First Amendment rights. Where legislation abuts First Amendment freedoms, the imposition of a scienter standard does nothing to eliminate the problem caused by vague laws in the First Amendment context. The harm in the First Amendment context,

whether scienter is present or not, is that citizens will be forced to steer wider of the unlawful zone than if the boundaries were clearly marked. Given the fundamental nature of the First Amendment freedoms, it is this chilling effect that is a constitutional harm in and of itself. In *Cramp* v. *Board of Public Instruction,* 368 U.S. 278, 82 S.Ct. 275, 7 L.Ed.2d 285 (1961) the Court dealt with a Florida loyalty oath into which the element of scienter had been read by the Supreme Court of Florida. Speaking for a unanimous Court, Justice Stewart adopted the language found in *Smith* v. *California,* 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959), which stated: "stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril, because the free dissimination of ideas may be the loser."

The only safe approach for a merchant to take in the Village of Hoffman Estates is to avoid stocking or displaying any literature which might be deemed to encourage the illegal use of drugs. The impact of this act of self-preservation is indicated in 26 Minn.L.Rev. 661 (1942):

> It is clear that more must be shown to convict a man where intent must be proved than where it is not required. Yet it is equally clear that where the overt act which constitutes the crime is insufficiently defined, a stipulation that the act must be done intentionally before it is unlawful is of no aid in determining what acts are in fact within the definition. Furthermore, when the person affected is confronted with the borderline situation in which he has honest doubts as to the proper action, a resolution of the doubt in his own favor is often indistinguishable from a willful evasion. Consequently, the vagueness of the definition compels men to lean over backward in many circumstances in order to avoid imputations of the intent or bad faith specified in the statute.

In the context of First Amendment freedoms, such bending over backward to avoid the imputation of bad intent is the very chilling effect which this Court has found, as a basic policy matter, is unacceptable.

In summary, then, the Hoffman Estates ordinances fails to provide reasonable notice to men of ordinary intelligence of the acts which it seeks to regulate. Even assuming that scienter is a necessary element of a prosecution for violation of this ordinance, the ordinance and its guidelines fail to specify the circumstances in which specific intent necessary to violate the law may be inferred. Barring delineation of those circumstances, the addition of an element of scienter to the prosecution for violation of the ordinance does nothing to specify what acts are purportedly covered or prohibited in the absence of a license. The true purpose behind the Hoffman Estates ordinance, that being to discourage the purchase of items such as the ones sought to be regulated, is most effectively accomplished by the passage of a vague and ill-defined ordinance such as the one at issue. While the ordinance may serve such a purpose, it fails to satisfy the necessary requirements of due process of the law as required by the Constitution of the United States.

CONCLUSION

For all of the above reasons, Amicus respectively submits that this Court should affirm the judgment of the Court of Appeals for the Seventh Circuit below in all respects. Alternatively, should the Court find the ordinance not impermissibly vague, the case should be remanded to the Court of Appeals for consideration of other constitutional defects alleged below.

Respectfully submitted,

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